



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: WCM-126

MEMORANDUM

SUBJECT: Proposed Penalty – Philip Services Corporation/Burlington Environmental, Inc.,
Georgetown Facility, Seattle, Washington; WAD 00081 2909;
U.S. Docket No. RCRA-10-2001-0188

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TO: Joan Shirley
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DATE: August 3, 2001

In this memorandum I describe the factors and process used to calculate the penalty proposed in the Complaint, Compliance Order and Notice of Opportunity for Hearing ('Complaint') against Philip Services Corporation/Burlington Environmental, Inc., Georgetown Facility located in Seattle, Washington. The proposed penalty was calculated through application of the statutory factors of Section 3008(a)(3) of the Resource Conservation and Recovery Act (RCRA) as interpreted in the October 1990 RCRA Civil Penalty Policy (RCPP). In accordance with EPA policy [May 9, 1997, Memorandum entitled, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act (DCIA) of 1996)], the proposed penalty has been increased by ten percent for all violations occurring on or after January 30, 1997. In addition, an economic benefit component has been calculated where appropriate. The proposed penalty for eight counts is described in the attached, penalty justification narratives.

BACKGROUND: RCRA Civil Penalty Policy

The penalty calculation analysis established by the RCPP consists of (1) determining a gravity-based penalty for each violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this

amount the appropriate economic benefit gained through non-compliance. More specifically, the RCPP establishes the following penalty calculation methodology:

$$\text{Penalty Amount} = \text{gravity-based component} + \text{multi-day component} \\ + \text{adjustments} + \text{economic benefit.}$$

The **gravity-component** of the penalty is determined from a matrix based on the “potential for harm” resulting from the violation and the “extent of the deviation” from the requirements.

The assessment of the “potential for harm” resulting from a violation is based on two factors:

- S the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and
- S the adverse effect noncompliance may have on statutory or regulatory purposes *or* procedures for implementing the RCRA program.

The “extent of deviation” from the RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated.

Each of the above factors—“potential for harm” and “extent of deviation” from a requirement, forms one of the axes of the penalty assessment matrix set forth in the RCPP. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. The complete matrix is illustrated in Figure 1.

A range of numbers is provided in each matrix cell to serve as a “fine tuning” device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. In selecting a dollar figure from this range, it is appropriate to consider such factors as the seriousness of the violation (relative to other violations falling within the same matrix cell), efforts at remediation or the degree of cooperation evidenced by the facility (to the extent the factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator, and the number of days of violation.

The RCPP further directs that to the extent that violation can be shown or presumed to have continued for more than one day, an appropriate **multi-day component**, reflecting the duration of the violation at issue, should be calculated. After it has been determined that any of the violations alleged has continued for more than one day, the next step is to determine the length of time each violation

continued and whether a multi-day penalty is mandatory, presumed, or discretionary.

After the duration of the violation has been determined, the multi-day component of the total penalty is calculated, pursuant to the Multi-day Matrix, as follows:

- (1) Determine the gravity-based designations for the violation, e.g., major-major, moderate-minor, or minor-minor,
- (2) Determine, for the specific violation, whether multi-day penalties are mandatory, presumed, or discretionary, as follows:
 - S Multi-day penalties are mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate, moderate-major. Multi-day penalties for days 181 and above, are discretionary.
 - S Multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations: major-minor, moderate-moderate, minor-major. Therefore, Multi-day penalties must be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. Multi-day penalties for days 181 and above, are discretionary.
 - S Multi-day penalties are discretionary, generally, for all days of all violations with the following gravity-based designations: moderate-minor, minor-moderate, minor-minor. In these cases, Multi-day penalties should be sought where case-specific facts support such an assessment. Discretionary Multi-day penalties may be imposed for some or all days. The bases for decisions to impose or not to impose any discretionary Multi-day penalties must be documented in the case files.

RCRA § 3008(a)(3) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. The RCPP sets out several other **adjustment factors** to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. For any given factor (except ability to pay and mitigative risk) enforcement personnel can, assuming proper documentation, adjust the sum of the gravity-based and multi-day penalty components for any given violation up or down by (1) as much as 25% of that sum in ordinary circumstances or (2) from 26% to 40% of that sum, in unusual circumstances. Downward adjustments based on inability to pay or litigative risk will vary in amount depending on the individual facts present in a given case and in certain circumstances, may be applied

to the economic benefit component.

The violator can manifest **good faith** by promptly identifying and identifying and reporting noncompliance or instituting measures to remedy the violation before EPA detects the violation.

In assessing the degree of **willfulness, and/or negligence**, the RCPP directs that the following factors should be considered, as well as any other deemed appropriate:

- how much control the violator had over the events constituting the violation;
- the foresee ability of the events constituting the violation;
- whether the violator took reasonable precautions against the events constituting the violation;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known of the legal requirements which was violated.

Upward adjustment based on **history of noncompliance** is appropriate where a party previously has violated RCRA or State hazardous waste law at the same *or* a different site, because EPA considers this to be clear evidence that the party was not deterred by the previous enforcement response unless the current or previous violation was caused by factors entirely out of the control of the violator. The RCPP directs that the following factors should be considered:

- to how similar the previous violation was,
- how recent the previous violation was,
- the number of previous violations, and
- violator's response to previous violation(s) in regard to correction of problem

The RCPP further notes, "[A] violation generally should be considered "similar" if EPA's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A prior violation of the same RCRA or State requirement would constitute a similar violation. Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute. For purposes of this section, "prior violation includes any act or omission for which a formal or informal enforcement response has occurred (e.g. EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree). It also includes any act or omission for which the violator has previously been given written notification, however informal, that EPA believes a violation exists."

Attachment
Figure 1